No. 11235

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

APPELLANTS' REPLY BRIEF.

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Appellees.

APPELLANTS' REPLY BRIEF.

Certain matters referred to in Appellees' Brief[1] are dealt with under the following headings.

I.

The Intent of the Insured.

The District Court found that it was the intention of the insured

> "as indicated by the provisions of the said policy and the *surrounding circumstances* under which the policy

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[1]Herein references to "Brief" are to pages of Appellees' Brief, and to "R" are to pages of the Transcript of Record. Italics throughout this brief have been supplied.

> was issued and the *surrounding circumstances* at the time of the said change of Direct Beneficiary and the designation of the said three children as Contingent Beneficiaries to financially provide for and protect his widow during her lifetime, and next his own children, rather than the creditors, heirs or legatees of the estate of his widow if she should survive the insured and then die before receiving the benefits due or to become due under the said policy." [R. 27.]

What were these "surrounding circumstances"?

The record does not show what they were.[2]

Appellees argue (Brief 26) that they were:

1. The fact that the policy, before the beneficiary was changed, made the children the Direct Beneficiaries.

2. The fact that when the wife was made Direct Beneficiary, the children were made Contingent Beneficiaries.

3. The fact that the Contingent Beneficiaries are the insured's children.

But a reading of the finding quoted above discloses that the "surrounding circumstances" referred to are *something in addition to the "provisions of the said policy" and in addition to the "change of Direct Beneficiary."*

The truth is that there has been no disclosure of any surrounding circumstances in addition to the provisions of the policy and the change of Direct Beneficiary.

Accordingly, we must ascertain the insured's intent *solely* from the policy and the change of Direct Bene-

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[2]A *complete* transcript of the trial proceedings appears in the printed Transcript of Record at page 37 *et seq.* The factual statement referred to at the beginning of the trial [R. 38] is printed in the Transcript of Record at page 36b.

ficiary thereunder. All else is conjecture. Yet the District Court permitted such conjecture to influence its interpretation of the policy. (See our Opening Brief, p. 29 *et seq.*)

Appellees also urge that the policy must be so interpreted as to favor the "natural inclination of the insured to provide for his own children before strangers." (Brief 8.) The difficulty with this contention is that the insured *expressly stated* an inclination to prefer his wife to his children:

> By making his wife Direct Beneficiary *in place of his children.* [R. 39, 55.]
>
> By giving his wife the right *just as soon as he died* (his wife surviving) to select an optional method of payment *and designate any Contingent Beneficiary she wished in place of the children.* [R. 45.][3]

This did not show paramount solicitude for insured's children. On the contrary it manifested a clear intent that the proceeds of the policy should be subject to the wife's *sole control and disposal the minute the insured died* even though this meant that the children would receive nothing.

Of course the wife did not exercise this right before her death following the death of the insured. But here we are attempting to ascertain the insured's intent, and the fact that the wife was given this right by the *express terms of the policy* certainly shows an intent on the part of the insured to vest the proceeds of the policy in his wife *when he died,* even though this resulted in the exclusion of the insured's children.

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[3]The insured did this by *failing to elect* an optional method of payment under paragraph 1 of the Special Provisions, thus granting the Direct Beneficiary such right under paragraph 1a. [R. 45.]

The foregoing reinforces our argument (see our Opening Brief, p. 14 *et seq.*) that sentence (C) of paragraph 11 of the policy's General Provisions, must be interpreted as referring to a death of the Direct Beneficiary *before the death of the insured.*

II.

The Interpretation Which Would Be Adopted in an Instrument of Testamentary Character.

Appellees urge (Brief 8) that the policy should "be given the broad interpretation *followed in instruments of testamentary character . . .*" Suppose that the clause here in issue, *i. e.*, a part of paragraph 11 of the General Provisions [R. 43, 44], had been found in Hill's will. Such testamentary clause would have read something like this:

> "I give and bequeath $10,000 to my wife, but upon her death, my children, if any *'shall succeed to the interest of'* my wife."

How would this be interpreted if the wife survived the testator but died before distribution? Under the authorities the answer is clear. The death referred to would be interpreted to mean a death of the wife occurring *before the death of the insured.*

As said by Mr. Justice Gray in *Britton v. Thornton,* 112 U. S. 526, 532 (1884):

> "When indeed a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure

to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring *only to death in the testator's lifetime.*"

As said in *McClellan v. MacKenzie,* 126 Fed. 701, 705 (C. C. A. 6, 1903):

"The law favors the vesting of estates at the earliest possible time. *When a devise or bequest over to a third person is made dependent upon the death of the first taker as a contingency, the death referred to is generally held to be a death in the lifetime of the testator.*"

In *Blain v. Dean,* 160 Iowa 708, 142 N. W. 418 (1913), a will provided, "If any of my children shall have died leaving no issue I direct that his share shall be divided among those leaving issue and among my other children then living." A year and five months after the testator's death and pending administration of his estate one of his daughters died. Holding that she acquired at the testator's death a "vested interest" in his estate which must pass to her heirs, rather than to the other children of the testator, the Court said (142 N. W. at 421):

"It is impossible to reconcile all the decisions along this line, but it is not too much to say that *the very great weight of authority* is to the effect that a devise to one person with devise over to another in case the first-named beneficiary shall die without issue is to be interpreted *as having reference to the death of such beneficiary before the will takes effect by the decease of the testator,* and that, if the beneficiary be

living at the time of the testator's death, the devise takes effect, although the time for its enjoyment is postponed to some future period or date of distribution."

Accord:

DeHaan v. DeHaan, 309 Ill. 323, 141 N. E. 184 (1923);

Rue v. Lisle, 200 Ky. 520, 255 S. W. 133 (1923);

Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388 (1895);

In re Lovass' Estate, 92 Wis. 616, 67 N. W. 605 (1896).

III.

Paragraph 5 of the Special Provisions.

A reference to paragraph 5 of the policy's Special Provisions [R. 46] does not benefit appellees. As pointed out in our Opening Brief (p. 19) these "Special Provisions" embody a scheme whereby the policy may be continued in effect and operation after the death of the insured, instead of terminating upon payment of the proceeds in one sum upon the insured's death. *In this case the Special Provisions never became operative.*

But a comparison of paragraph 5 of the Special Provisions with paragraph 11 of the General Provisions further supports our interpretation of paragraph 11, *i. e.,* that paragraph 11 relates solely to contingencies happening *before the death of the insured.* (See our Opening Brief, p. 13 *et seq.*)

(1)	(2)
(Paragraph 11 of General Provisions): "Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary . . ." [R. 43, 44.]	(Paragraph 5 of Special Provisions): "Upon the death of the last surviving Direct Beneficiary the *then surviving* Contingent Beneficiary or Beneficiaries shall succeed to the remaining benefits otherwise payable to such Direct Beneficiary . . ." [R. 46.]

(1) above was intended to speak of what might occur *prior to the death of the insured.* A comparison with (2) above reinforces this conclusion. Note the italicized words in (2) which are not found in (1). Why are the words *"then surviving"* omitted in (1)? If (1) is intended to apply to events occurring *after* the death of the insured, then surely such italicized words are necessary. Suppose, for example, that a Direct Beneficiary and two Contingent Beneficiaries survive the insured, and that one of the Contingent Beneficiaries dies 10 days later and the Direct Beneficiary dies 20 days later before the proceeds of the policy have been paid, and suppose that (2) will not govern the rights of the parties, there having been no election to employ the Special Provisions. If, as appellees contend, (1) is to govern events occurring *after* the death of the insured, the *absence* in (1) of the words *"then surviving"* immediately gives rise to controversy as to whether all Contingent Beneficiaries who survived the insured shall take, or whether only the Contingent Beneficiary who survived the insured *and survived the Direct Beneficiary* shall take.

The truth of the matter is that the General Provisions, including paragraph 11, were intended to apply to matters which might happen *at or prior to the death of the insured;* the Special Provisions were intended to govern contingencies occurring *after the death of the insured* in the event (which did not occur here) that an election to make the Special Provisions applicable was exercised. Clearly this was the broad over-all scheme of the policy. An interpretation which would make paragraph 11 of the General Provisions applicable to contingencies occurring *after the death of the insured,* makes the insurance company, by paying promptly or delaying payment, the arbiter as to who shall take the proceeds of the policy. This could not have been the intent of the parties.

IV.

The Contention That Our Interpretation Would Make Performance of the Policy Contract Impossible.

Appellees urge (Brief 10) that the interpretation of the policy we contend for would make performance of the policy contract impossible where the Direct Beneficiary dies after the death of the insured but before the receipt of proof of death. Our argument was that the insurance company promised to pay the proceeds of the policy *"immediately"* upon due proof of death to the Direct Beneficiary; that this definite obligation to pay immediately required an interpretation of the policy by which a beneficiary of this payment would likewise then be capable of definite ascertainment—not a beneficiary whose identity depended upon indefinite events which might or might not happen over an indefinite period. (See our Opening Brief, p. 6 *et seq.*) This argument does not lead to an absurdity as suggested by appellees. If, as we contend, the wife acquired a vested right to the proceeds

of the policy as soon as she survived the insured, her death following that of the insured but before proof of the insured's death, would not result in the absence of a beneficiary to enforce the insurance company's promise to pay "immediately." The death on January 1 of the payee of a promissory note maturing on January 2 does not result in the lack of a promisee to enforce the obligation of the maker of the note.

V.

The Contention That the Contingent Beneficiaries Had a Vested Interest.

Appellees concede (Brief 12) that our exposition of the rule of vesting (see our Brief, p. 9 *et seq.*) correctly states the law. But appellees contend (Brief 12) that "a contingent beneficiary is also a beneficiary under this rule"; that "upon the death of the insured the rights of both the wife . . . and the children . . . became vested or fixed"; that "these rights were that the wife should take the payments made to her during her life and that upon her decease the children should succeed to the balance of the benefits due or to become due." We agree that the rights of both the wife and the children had to be finally ascertained "upon the death of the insured." At that date the wife, being living, acquired a right to the proceeds of the policy. *It is conceded that if the proceeds of the policy had been paid to her before her death, such proceeds could have been retained by her estate,* even though the children received nothing. Under a correct interpretation of the policy this right, vesting in the surviving wife at the death of the insured, was not subject to any condition subsequent admitting the children to participation.

VI.

The Contention That Our Interpretation Would Result in a Poorly Drafted Policy.

Commenting upon our interpretation of paragraph 11 of the policy's General Provisions (see our Opening Brief, p. 13) appellees argue (Brief 14) that such interpretation would result in a poorly drafted policy, since such interpretation makes paragraph 11 applicable solely to contingencies which may happen *before* the death of the insured and "would leave the whole matter of contingencies *after* the death of the insured without any coverage by the policy." But as pointed out in our Opening Brief (p. 18) all of the paragraphs of the General Provisions of the policy deal with situations and contingencies which must arise, if at all, at or *before* the death of the insured. Paragraph 11 of the General Provisions is no exception. It was not necessary for the draftsman of the policy to provide under paragraph 11 for what should happen *after* the death of the insured. Usual rules of law would cover such situation. (See our Opening Brief, pp. 16, 17.) If the general law says what shall happen in a given contingency, the draftsman of a contract may not properly be accused of "poor draftsmanship" in failing to specifically provide therein for such contingency.

VII.

The Difference Between the Fink Case and Our Case.

The facts in *Northwestern Mut. Life Ins. Co. v. Fink*, 118 F. (2d) 761 (C. C. A. 6, 1941), cited and relied upon by appellees (Brief *27 et seq.*), are clearly different from the facts presented in our case.

Granted that the body of the policy in the *Fink* case was much like the body of the policy in our case, the Court in the *Fink* case decided the issue, *not on the language of paragraph 11 of the General Provisions of the policy, but on the language of the designation-of-beneficiary clause.* This is clear from the language of the opinion (118 F. (2d) at 763).

Now compare the language of this designation-of-beneficiary clause in the *Fink* case and the language of the policy in our case upon which appellees rely:

(1)	(2)
(*Fink* case)	(Our case)
"In the event of the death of Charlotte Wolf [Direct Beneficiary], *such share as she would have been entitled to receive* shall be payable to Virginia C. Wolf and Edwin Wolf [Contingent Beneficiaries] . . ."	"Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, *shall succeed to the interest* of such Direct Beneficiary, . . ." [R. 43, 44.]

The difference between these two is significant and decisive.

In the *Fink* case (1), above, the Contingent Beneficiaries, in the event of the death of the Direct Beneficiary, get "such shares as she [the Direct Beneficiary] *would have been entitled to receive.*"

In our case (2), above, the Contingent Beneficiaries, in the event of the death of the last Direct Beneficiary, "*succeed to the interest* of such Direct Beneficiary."

Bearing in mind (as pointed out in our Opening Brief, p. 9 *et seq.*) that a beneficiary does not obtain a vested interest until the death of the insured when (as here) a right to change the beneficiary is reserved, it is clear that until the insured dies the Direct Beneficiary is not "*entitled to receive*" anything. Therefore, in the *Fink* case the statement that the share the Direct Beneficiary was "*entitled to receive*" should upon her death be paid to the Contingent Beneficiaries, *must* have referred to a payment to be made *after* the death of the insured. Before the insured's death the Direct Beneficiary was not and could not have been "*entitled*" to anything.

This is not true of the language used in our case. There it is stated that upon the death of the Direct Beneficiary, the Contingent Beneficiaries shall "*succeed to the interest* of such Direct Beneficiary." This is consistent with our contention that the death of the Direct Beneficiary referred to is a death of such Beneficiary occurring before the death of the insured. Before the insured's death the Direct Beneficiary, while not "*entitled to receive*" anything, nevertheless had an expectancy or contingent "*interest.*" (Our Opening Brief, p. 9 *et seq.*)

In the *Fink* case it was held that the language of the designation-of-beneficiary clause determined what should occur upon the death of the Direct Beneficiary *after* the death of the insured.

In our case the language of the policy does not govern what should occur upon the death of the Direct Beneficiary *after* the death of the insured. That contingency is governed by the usual rule of law determining the vesting of a beneficiary's interest. (Our Opening Brief, p. 9 *et seq.*) By that law the Direct Beneficiary, upon the death of the insured, acquired a vested interest in the proceeds of the policy. There is nothing in the policy forbidding this result as there was in the *Fink* case. This being true, the usual rule of law should be applied.

It is respectfully submitted that the judgment of the District Court should be reversed.

May 25, 1946.

Respectfully submitted,

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